

August 23, 2005

Jennifer K. McCain
Assistant City Attorney
City of Escondido
[Address Redacted]
Escondido, CA 92025

**Re: Your Request for Advice
Our File No. A-05-151**

Dear Ms. McCain:

This letter is in response to your request for advice on behalf of Councilmember Sam Abed regarding the conflict-of-interest provisions of the Political Reform Act (the “Act”).¹

QUESTION

May Councilmember Sam Abed participate in decisions involving the relocation of Palomar Hospital to the Spruce Street site when he owns property located within 750 feet of the proposed location?

CONCLUSION

Because the councilmember’s properties are located more than 500 feet from the boundaries of the proposed relocation of the hospital at the Spruce Street site, it is presumed that the governmental decision will not have a reasonably foreseeably material financial effect on his properties. However, this presumption may be rebutted if specific circumstances make it reasonably foreseeable that the decision will result in a material financial effect on the councilmember’s real property. See discussion below.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

The City of Escondido has formed an ad hoc committee consisting of two council members (other than Councilmember Abed) to discuss the relocation of Palomar Hospital currently located downtown. The actual decision where to locate a hospital is within the jurisdiction of a local hospital district, the Palomar Pomerado Health District. However, the city council has land use authority over the current site from which the hospital proposes to move and *over* locations to which the district would like to locate a new hospital. The ad hoc committee updates the city council on the progress of the hospital relocation. To date, the city council has discussed several possible locations for the new hospital.

Councilmember Abed owns real property in Escondido located at 540 and 562 W. Grand Avenue. Councilmember Abed receives rental income from both of these properties. Councilmember Abed's real property is located approximately 750 feet from one of the proposed sites referred to as the Spruce Street site. Portions of the Spruce Street property are owned by the city.

The city council has not yet made any decisions regarding the relocation of the hospital to Spruce Street or any other location. You wish to know whether Councilmember Abed may participate in decisions regarding relocation of the hospital involving the Spruce Street site.

ANALYSIS

Conflict-of-Interest Prohibition: Section 87100 prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest.

A public official has a "financial interest" in a governmental decision within the meaning of the Act, if it is reasonably foreseeable that the governmental decision will have a material financial effect on one or more of the public official's economic interests. (Section 87103; regulation 18700(a).) The Commission has adopted a standard eight-step analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision. (Regulation 18700(b)(1)-(8).)

1 & 2: Is Councilmember Abed considered a "public official" and will he be making, participating in making, or influencing a governmental decision?

The conflict-of-interest provisions of the Act pertain only to public officials. A public official includes "every member, officer, employee or consultant of a state or local government agency" (Section 82048; regulation 18701(a)(1).) Mr. Abed is an elected member of the city council, and thus a public official subject to the Act's conflict-of-interest provisions.

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.)

Councilmember Abed will “make a governmental decision” if he votes on any issue obligating the city with respect to decisions involving relocation of Palomar Hospital. In addition to actually voting on this matter, if he engage in negotiations without significant substantive review, provide advice or make recommendations, he will be “participating” in a decision (Regulation 18702.2). He will also be “influencing” that decision if he appears before or otherwise attempt to influence any member, officer, employee or consultant of the agency.² (Regulation 18702.3.)

3. What are Councilmember Abed’s economic interests?

Section 87103 provides that a public official has a “financial interest” in a governmental decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official, a member of his or her immediate family, or on any of the official’s economic interests, described as follows:

- An economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a); regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d); regulation 18703.1(b));
- An economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b); regulation 18703.2);
- An economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c); regulation 18703.3);
- An economic interest in any source of gifts to him or her if the gifts aggregate to \$360 or more within 12 months prior to the decision (Section 87103(e); regulation 18703.4);

² *Recusal Requirements:* If a public official enumerated in section 87200 (including city council members) has a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in regulation 18702.5 (copy enclosed), subdivisions (c) and (d) apply. (Section 87105). Since Mr. Abed is a council member, a position enumerated in Section 87200, these requirements apply to him.

In addition, a public official always has an economic interest in his or her personal finances, including those of his or her immediate family -- this is the “personal financial effects” rule (Section 87103; regulation 18703.5, enclosed).

Economic interests disclosed in your request for assistance³

Real Property Interests:

540 & 562 W. Grand Avenue Properties: You state that Councilmember Abed owns two rental properties that are “approximately 750 feet from one of the proposed (hospital) sites referred to as the Spruce Street site.” Provided that Councilmember Abed has a direct or indirect interest worth \$2,000 or more in each of these properties, he will have an economic interest in the properties for purposes of disqualification under sections 87100 and 87103.

Personal Finances:

Councilmember Abed also has an economic interest in his personal finances and those of his immediate family. (Section 87103; regulation 18703.5.) A governmental decision will have an effect on this economic interest if the decision will result in the personal expenses, income, assets or liabilities of the official or his or her immediate family increasing or decreasing. (Ibid.)

Your letter does not mention any impact on Councilmember Abed’s personal finances as the result of the proposed development agreements, therefore we do not further discuss this basis for disqualification in our analysis. But note that a conflict of interest may arise if it is reasonably foreseeable that the decision will have an effect on Councilmember Abed’s personal finances.

4. Is the councilmember’s economic interest directly or indirectly involved in the governmental decision?

The general rule is that an official’s real property is considered to be directly involved in a decision if it meets any of the criteria in regulation 18704.2(a) (enclosed). This regulation states that real property (in which the official has an interest) is directly involved in a governmental decision when it is “located within 500 feet of the boundaries

³ We note that there are other economic interests listed on Councilmember Abed’s Form 700 (Statement of Economic Interests) that are not mentioned in your letter, thus we do not include them in our analysis. However, Councilmember Abed must still determine whether a conflict of interest will arise from any of these economic interests (i.e., whether it is reasonably foreseeable that the governmental decision he participates in will result in a material financial effect on these interests).

(or the proposed boundaries) of the property which is the subject of the governmental decision.” (Regulation 18704.2(a)(1).)

540 & 562 W. Grand Avenue Properties:

Because the W. Grand Avenue properties involved are not located within 500 feet of the boundaries or proposed boundaries of the property which is the subject of the governmental decision, they appear *indirectly* involved.⁴ (Regulation 18704.2(a)(1).)

5. Applicable Materiality Standard

A conflict of interest may arise only when the reasonably foreseeable impact of a governmental decision on a public official’s economic interests is material. (Regulation 18700(a).) Different standards apply to determine whether reasonably foreseeable financial effect on an economic interest will be material, depending on the nature of the economic interest and whether that interest is directly or indirectly involved in the agency’s decision.

Regulation 18705.2(b)(1) provides that the financial effect of a governmental decision on real property which is indirectly involved in the governmental decision is *presumed not* to be material. This *presumption may be rebutted* by proof that there are specific circumstances regarding the governmental decision, its financial effect, and the nature of the real property in which the public official has an economic interest, which make it reasonably foreseeable that the decision will have a material financial effect on the real property in which the official has an interest. Examples of these specific circumstances include circumstances where the decision affects:

- “(A) The development potential or income producing potential of the real property in which the official has an economic interest;
- (B) The use of the real property in which the official has an economic interest;
- (C) The *character of the neighborhood* including, but not limited to, *substantial effects on: traffic, view, privacy, intensity of use, noise levels, air emissions*, or similar traits of the neighborhood.” [Emphasis added.]

⁴ A public official’s real property is also deemed to be directly involved in a governmental decision if “the decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or improved services.” (Regulation 18704.2(a)(6).) You have not provided any information regarding new or improved services that may benefit the councilmember’s property as the result of the project. However, please note if the decision to relocate the hospital to the proposed site will result in such improvements, or will add new services to the area, the councilmember’s property will be deemed directly involved, and thus the financial effect of the governmental decision on the councilmember’s property would be presumed material.

Councilmember Abed will need to determine whether the relocation project will have a material financial effect on his real property based upon any of the above factors, or any additional factors that could affect the value of his real property. You did not provide any details about potential impacts on surrounding areas as a result of the proposed hospital relocation. However, it appears to be a significant, large-scale project that may possibly rebut the above presumption due to its potential financial effects and its impact on the character of the surrounding areas, including Mr. Abed's neighborhood.

In prior advice, we stated the materiality presumption may have been rebutted in a case where the effect of a decision would impact traffic patterns and property values with respect to a street extension adjacent to a homeowner's association common area in which two council members hold property interests. (*Thorson* Advice Letter, No. A-04-238, enclosed.) In another case, the governmental decision involving a development project that was one-quarter mile from an official's residence appeared to change the character of the area near the official's home from largely rural to largely residential. (*Herrick* Advice Letter, No. A-04-019.)

Whether a governmental decision will affect the characteristics of the neighborhood in which the councilmember's property is located and thus also have a financial affect on his property, is a factual question for the councilmember to decide. Therefore cannot, in providing advice, determine whether the presumption has been rebutted.

6. Foreseeability

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. As used here, "reasonably foreseeable" means "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable; a substantial likelihood that it will occur suffices to meet the standard. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable. (*Ibid.*)

Because the councilmember's properties are located more than 500 feet from the boundaries of the proposed relocation of the hospital at the Spruce Street site, it is presumed that the governmental decision will *not* have a reasonably foreseeably material financial effect on his properties. However, this presumption may be rebutted if specific circumstances make it reasonably foreseeable that the decision will result in a material financial effect on the councilmember's real property.

Because the Commission does not act as a finder of fact in providing advice (*In re Oglesby*, (1975) 1 FPPC Ops. 71, 77.), it is ultimately up to Councilmember Abed to decide whether his facts are sufficient to rebut this presumption.

7 & 8: The Public Generally and Legally Required Participation Exceptions

An official who otherwise has a conflict of interest in a decision may still participate under the “public generally” exception. This exception applies when the financial effect of a decision on a public official’s economic interests is substantially the same as the effect on a significant segment of the public.

The “legally required participation” rule applies when the official’s participation in a governmental decision is legally required. (Section 87101; regulation 18708.) You have not presented any facts indicating that these exceptions are applicable to your situation; therefore we do not address them here.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

By: Emelyn Rodriguez
Counsel, Legal Division

Enclosures
ER:rd
I:\AdviceLtrs\05-151